

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL DIAZ ROBLES,

Defendant and Appellant.

D059188

(Super. Ct. No. FSB055540)

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS ANTHONY SOTO,

Defendant and Appellant.

D059374

(Super. Ct. No. FSB055540)

CONSOLIDATED APPEALS from judgments of the Superior Court of San Bernardino County, Brian S. McCarville, Judge. Affirmed in part, reversed in part, and remanded.

## INTRODUCTION

A jury found Daniel Diaz Robles guilty of the first degree murder (Pen. Code, § 187, subd. (a); count 1)<sup>1</sup> and kidnapping (§ 207, subd. (a); count 2) of Melquiades Rojas. As to both counts, the jury found true allegations Robles committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)) (gang benefit enhancement). As to both counts, the jury also found true three firearm enhancement allegations: (1) a principal used a firearm (§ 12022.53, subds. (b) & (e)(1)) (subdivision (b) firearm enhancement); (2) a principal personally and intentionally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)) (subdivision (c) firearm enhancement); and (3) a principal personally and intentionally discharged a firearm proximately causing death (§ 12022.53, subds. (d) & (e)(1)) (subdivision (d) firearm enhancement).<sup>2</sup>

The trial court sentenced Robles to a determinate term of 15 years in prison plus a consecutive indeterminate term of 50 years to life. The determinate portion of the

---

<sup>1</sup> Further statutory references are also to the Penal Code unless otherwise stated.

<sup>2</sup> As to the murder count, the jury found three special circumstance allegations not true. The allegations were that: (1) Rojas was a witness to a crime and Robles intentionally killed him in retaliation for his testimony at a criminal proceeding (§ 190.2, subd. (a)(10)); (2) the murder was committed while Robles was engaged in the commission of the crime of kidnapping (§ 190.2, subd. (a)(17)(B)); and (3) Robles intentionally killed Rojas while Robles was an active participant in a criminal street gang and the murder was carried out to further the activities of the criminal street gang (§ 190.2, subd. (a)(22)).

sentence consisted of the middle term of five years for the kidnapping conviction, plus 10 years for the attendant gang benefit enhancement. The indeterminate portion of the sentence consisted of a term of 25 years to life for the first degree murder conviction plus 25 years to life for the attendant subdivision (d) firearm enhancement. The trial court stayed the sentences for the count 1 gang benefit enhancement and the remaining count 1 and 2 firearm enhancements.

A separate jury convicted Carlos Anthony Soto of the second degree murder (§ 187, subd. (a); count 1) and kidnapping of Rojas (§ 207, subd. (a); count 2).<sup>3</sup> The jury also found true the same gang benefit and firearm enhancement allegations found true in Robles's case.

The trial court sentenced Soto to a determinate term of 15 years in prison plus a consecutive indeterminate term of 40 years to life. Like the determinate portion of Robles's sentence, the determinate portion of Soto's sentence consisted of the middle term of five years for the kidnapping conviction, plus 10 years for the attendant gang benefit enhancement. The indeterminate portion of Soto's sentence consisted of a term of 15 years to life for the second degree murder conviction plus 25 years to life for the attendant subdivision (d) firearm enhancement. The trial court stayed the sentences for

---

<sup>3</sup> The prosecutor charged Robles and Soto together. At the prosecutor's request, the trial court empanelled separate juries because of an admission by Soto implicating Robles.

the count 1 gang benefit enhancement and the remaining count 1 and 2 firearm enhancements.

Robles and Soto both appeal.<sup>4</sup> Robles contends the trial court violated his right to due process of law by instructing the jury on the felony-murder rule. He additionally contends the trial court abused its discretion in admitting evidence of more than three predicate crimes to establish the gang benefit enhancement because more than three was unnecessary and cumulative. He further contends there is insufficient evidence to support the true findings for the subdivision (c) and subdivision (d) firearm enhancements.

Both Robles and Soto contend the trial court was required to stay the sentences for their kidnapping convictions under section 654. Soto also contends we must strike the sentence for the gang benefit enhancement attendant to his kidnapping conviction because a trial court may not impose sentences for a firearm enhancement and a gang benefit enhancement in the same case where the defendant did not personally use or discharge a firearm.

As part of the People's response to the latter contention, the People assert the sentence for Soto's kidnapping conviction is unauthorized because the trial court was required to stay the sentence for the gang benefit enhancement and impose a 25-year-to-life sentence for the subdivision (d) firearm enhancement instead. As the trial court

---

<sup>4</sup> Robles and Soto filed their appeals at different times. We consolidated the appeals on our own motion.

imposed identical sentences for Robles's and Soto's kidnapping convictions, we requested further briefing from Robles on this point.

After considering the additional briefing, we agree with the People that the sentences for Robles's and Soto's kidnapping convictions were unauthorized. We therefore vacate the sentences for these convictions and remand the matter to the trial court for resentencing. In all other respects, we affirm the judgments.

## BACKGROUND

### *Evidence Presented to Both Juries*

#### *Prosecution's Case*

##### *Murder and Kidnapping of Rojas*

From January 31 to February 2, 2006, Rojas testified against two fellow West Side Verdugo (WSV) gang members accused of murder of one man and attempted murder of another man. During his testimony, Rojas explained his involvement in the gang, identified the suspects, and testified about facts of the case. A jury subsequently convicted the two men. The WSV gang then labeled Rojas "a rat."

In March 2006 WSV gang member Bennie Ramirez and another man went to Rojas's apartment, where Rojas lived with Desirie Ayala (Desirie), Melissa Ayala (Melissa), and Raymond Cabral. Desirie opened the door and Ramirez asked for Rojas. She falsely told him Rojas was not there. Ramirez then pulled out a gun and ordered everyone in the apartment to go into the living room and to empty their pockets. Ramirez

then walked around the apartment looking for things to steal. He stole Cabral's stereo, stating he was doing it because Rojas was "a rat."

Approximately two weeks later, on April 2, 2006, Soto came to the front door of Rojas's apartment and Rojas left with him. An hour later, Rojas called Desirie, told her he was at Soto's home and asked her for a ride. She could not give him a ride, but he got a ride from a neighbor and returned to their apartment 15 minutes later. He looked nervous and told Desirie and Melissa to say he was not there if anyone came looking for him.

Sometime later that day, Soto and a group of Hispanic men came to the back door of Rojas's apartment. Desirie knew one of the men by the moniker "Bear." Desirie and Cabral later identified Robles as "Bear" from a photograph.

When Desirie opened the door, Soto asked for Rojas and she told him Rojas was not home. Soto pointed a gun at her and he and his companions forced their way into the apartment. They chased Rojas into the bathroom and began to beat him up. Cabral heard Rojas yell, "Help" and "Don't let them take me." However, the men told Cabral to mind his own business. The men then forced Rojas out of the apartment and continued beating him.

Two days later, on April 4, 2006, construction workers found Rojas's body in a canyon. He had abrasions on his face and 21 gunshot wounds from at least two different guns. Three of the gunshot wounds were in his head. He died within seconds of receiving the gunshot wounds.

A forensic technician found a nine-millimeter bullet casing and a bloody shirt near Rojas's body. There were no other metal objects on the ground within five feet of Rojas's body. Given the number of gunshot wounds, the amount of blood near Rojas's body was inconsistent with him being killed at that location.

### *Gang Evidence*

San Bernardino Police Officer and gang expert Marco Granado testified the WSV gang started in the 1940's and 50's and represents the west side of San Bernardino. The gang has roughly 1,000 members. There are several subsets, or cliques, within the gang, including the 7th Street Locos or Calle Siete Locos, Little Counts Gang, Sur Crazy Ones, Mt. Vernon, and Manor Boys. The common signs and symbols associated with the WSV gang include the letters WSV, the letters WS, and the word Verdugo. In addition, the letters MV and the number 32 are associated with the Mt. Vernon clique; the letters LC are associated with the Little Counts clique; the letters SCO are associated with the Sur Crazy Ones clique; and the letters CSO, the number 7, and the words seventh, 7th Street Locos, and Calle Siete are associated with the Calle Siete Locos clique. The primary activities of the gang are assaults, shootings, stabbings, murders, kidnappings, robberies, carjackings, vehicle thefts, extortion, witness intimidation, and narcotics trafficking.

To establish WSV gang members engage in a pattern of criminal activity, Officer Granado testified to seven predicate crimes. One of the crimes was the case where Rojas testified against WSV gang members. Another of the crimes was Ramirez's robbery of Rojas's apartment. The remaining crimes were:

In October 2005 Ralph Webb and another inmate stabbed a third inmate who was a dropout of the WSV gang. During the assault, Webb shouted "West Side Verdugo Little Counts."

In April 2005 Little Counts clique members Henry Ruiz and Ralph Ryan confronted a member of the rival Florencia 13 gang. After he twice failed to heed their directive to move out of the neighborhood, they lured him to an apartment where they shot and killed him.

In October 2003 Jose Nava, who is a member of the 7th Street Locos clique, shot and killed a man who came up and asked him for cigarette. Nava considered the request disrespectful.

In March 2003 WSV gang member Joe Carrillo shot at a man and his family because the man had purportedly told another gang member Carrillo had stolen his motorcycle. One of the shots struck an 11-year-old girl in the face.

In July 2000 WSV gang members Luis Mendoza and Lorenzo Arias went to the residence of the president of the 7th Street Locos clique and killed him because he had cooperated with law enforcement regarding Mexican Mafia activities. They also killed the man's brother, who was the president of the Little Counts clique, as well as two other members of the 7th Street Locos clique.

In Granado's opinion, the WSV gang was an active criminal street gang. He based his opinion on his knowledge of the WSV gang, the number of members it had, the common signs and symbols it used, and the acts of its members.



In response to a hypothetical question, Granado further opined a killing like the one that occurred in this case would benefit the WSV gang because it showed the gang's members that the gang does not tolerate ratting or snitching and if a gang member rats or snitches, he can expect to be killed. The killing would also enhance the status of the gang members who carried it out because it showed they are willing to go to extremes for the gang.

*Additional Evidence Before Robles's Jury*

Approximately two-and-a-half weeks after Rojas's killing, Beaumont Detective Francisco Velasquez interviewed Robles after giving him the advisements required by *Miranda v. Arizona* (1966) 384 U.S. 436, 444-445 (*Miranda* advisements). Robles denied any involvement in the crime. However, he told Velasquez he believed he was going to "do life" and "he didn't want to do life looking over his shoulder in prison, and that—or he didn't want to do life in a green suit, meaning being in protective custody."

Granado testified kidnapping was also one of the primary activities of the WSV gang and opined Robles was a member of the WSV gang. He based his opinion on Robles's prior admissions to being a gang member, his moniker, his gang-related tattoos, his association with other gang members, and his participation in efforts to expand the WSV gang's turf.

*Additional Evidence Before Soto's Jury*

Approximately 10 months after Rojas's killing, officers located and arrested Soto. Velasquez interviewed Soto after giving Soto *Miranda* advisements. Soto said he was a

member of the WSV gang. On April 2, 2006, he was standing outside his grandmother's house with Rojas when Robles and two other male WSV gang members who went by the monikers "Triste" and "Creeper" came and confronted Rojas about testifying against fellow gang members.

Rojas became scared and called for a ride. Someone picked him up and he left. Robles, Triste and Creeper then approached Soto and said they wanted to go to Rojas's apartment and talk to him. They all got into a sports utility vehicle (SUV), which Soto believed was stolen. Triste drove them to Rojas's apartment and parked near the back door. While Triste remained in the SUV, Soto, Robles, and Creeper went to the back door, knocked, and asked for Rojas. When Desirie told them he was not there, Robles and Creeper forced their way into the apartment armed with handguns. They chased Rojas into the bathroom and started beating him. Then, as they continued beating him, they dragged him out of the apartment and into the SUV, while Rojas yelled for help and pleaded, "Don't let them take me."

As Triste drove the SUV away, Robles and Creeper kept punching and hitting Rojas's face and head. They told Soto that "if he was down for his neighborhood," he would not say anything about the incident and, if he did, he would be killed. They also told him he had better not be "a rat."

Because Rojas's face started bleeding, either Robles or Creeper gave Rojas a white shirt to wipe the blood off. Rojas kept the shirt on his head and kept his head ducked while they were driving. They drove for approximately 30 minutes, then got off the

freeway near a location consistent with where the construction workers found Rojas's body. Robles, Creeper, and Rojas got out of the SUV. They told Soto he had to watch what happened or he would be next.

Robles kicked Rojas in the chest and knocked him down. Robles and Creeper then began shooting Rojas. After they were done shooting, they got back into the SUV and left. On the way back to Soto's house, they kept warning Soto not to say anything or he would be next.

During his interview with Velasquez, Soto kept repeating that he was not the shooter. He also kept asking to speak with the district attorney to work out a deal.

Granado opined Soto was a member of the WSV gang. He based his opinion on Soto's prior admissions to being a gang member, his gang-related tattoos, his association with other gang members, and his participation in efforts to expand the WSV gang's turf,

## DISCUSSION

### I

#### *Propriety of First Degree Felony-Murder Instruction*

The trial court's instructions to the jury included an instruction on the first degree felony-murder rule. In pertinent part, the first degree felony-murder rule provides, "All murder . . . committed in the perpetration of, or attempt to perpetrate, . . . kidnapping, . . . is murder of the first degree." (§ 189.) Robles contends the first degree felony-murder rule is inapplicable to the facts of this case and the trial court deprived him of due

process of law by instructing the jury on it because the evidence showed Rojas's kidnapping was only incidental to his murder.

Robles correctly asserts a trial court may not give an instruction inapplicable to the facts of the case. (*People v. Cross* (2008) 45 Cal.4th 58, 67.) "The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." ' ' (*People v. Alexander* (2010) 49 Cal.4th 846, 920.) We conclude, however, the trial court did not err in this manner.

To support his contention, Robles relies on *People v. Weidert* (1985) 39 Cal.3d 836 (*Weidert*). *Weidert* involved a successful challenge to a kidnapping-murder special circumstance finding. (*Id.* at p. 842.) The Supreme Court had previously held such a finding could not be sustained "where an accused's primary goal was not to kidnap but to kill, and where a [kidnapping] was merely incidental to a murder but not committed to advance an independent felonious purpose." (*Ibid.*, citing *People v. Green* (1980) 27 Cal.3d 1, 47-62 (*Green*), abrogated on another ground by *People v. Martinez* (1999) 20 Cal.4th 225, 235, & disapproved on another ground in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) Since the Attorney General in *Weidert* conceded there was insufficient evidence to establish the appellant committed the kidnapping to advance an independent

felonious purpose, the Supreme Court set aside the special circumstances finding.

(*Weidert, supra*, at p. 842.)

*Weidert* is inapposite for several reasons. First, the enactment of section 190.2, subdivision (a)(17)(M)<sup>5</sup> in 2000 superseded the specific holding for which Robles cites *Weidert*. (See *People v. Brents* (2012) 53 Cal.4th 599, 608, fn. 4) Second, *Weidert* involved the application of a felony-murder special circumstance, not the application of the felony-murder rule. As explained in the *Green* case relied upon by *Weidert*, the application of a felony-murder special circumstance generally requires the defendant to have an independent purpose for committing the underlying felony to distinguish murders subject to the death penalty from those that are not. (*Green, supra*, 27 Cal.3d at pp. 61-62.) This rationale does not support applying the independent purpose requirement to the first degree felony-murder rule.

Further, the California Supreme Court recently clarified that a similar rule, known as the merger doctrine,<sup>6</sup> does not apply to first degree felony-murder cases. (*People v.*

---

<sup>5</sup> Section 190.2, subdivision (a)(17)(M) provides: "To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder."

<sup>6</sup> The merger doctrine precludes application of the felony-murder rule in cases where the underlying felony is a burglary and the defendant made the felonious entry with the intent to commit an assault with a deadly weapon because the assault is an

*Farley, supra*, 46 Cal.4th at p. 1117.) The court concluded such a limiting rule conflicts with the Legislature's unambiguous intent for any killing committed in the perpetration of or attempt to perpetrate one of the felonies enumerated in section 189 to be first degree murder. (*Id.* at pp. 1118-1119.) This rationale also does not support applying the independent purpose requirement to the first degree felony-murder rule. We, therefore, decline to do so.

Moreover, even if we were to apply the independent purpose requirement here, it would not assist Robles. Subsequent to its decision in *Green*, the Supreme Court held the requirement is satisfied where the defendant concurrently intended to kill and to commit the underlying felony. (*People v. Brents, supra*, 53 Cal.4th at pp. 608-609; *People v. Mendoza* (2000) 24 Cal.4th 130, 182-183.) As we explain further in part IV, *post*, there is substantial evidence Robles concurrently intended to kidnap and to murder Rojas. Thus, we conclude the first degree felony-murder rule is applicable to this case and the trial court did not err in instructing the jury on it.

---

integral part of the murder and, therefore, merges with the murder. (*People v. Farley* (2009) 46 Cal.4th 1053, 1113-1114.)

## II

### *Admission of Excessive Predicate Gang Crimes*

#### A

As part of the proof of the gang enhancement allegations against Robles, the prosecutor introduced evidence of seven predicate offenses, summarized *ante*, involving nine members of the WSV gang and its cliques. After the introduction of the third predicate offense and every subsequent predicate offense, Robles's defense counsel objected under Evidence Code section 352. The trial court overruled each objection without comment.

Later, during a recess, the trial court clarified its rulings: "[W]hen Detective Granado was testifying as to the predicates, [Robles's defense counsel] made certain objections pursuant to [Evidence Code section] 352. I had indicated earlier that those similar objections were made by [Soto's defense counsel] during his examination of [Granado], and I sustained objections and certain items were then removed. [¶] And so the reason I allowed the—or the reason I did not sustain the [Evidence Code section] 352 objections is I did sustain them in front of the jury involving [Soto]. And on that basis, [the prosecutor] withdrew numerous exhibits that he wanted to use, the basis for going above the three was to—he had an opinion or a legal argument that possibly certain Court of Appeal opinions may require a higher number. And that's the reason he wanted to add more predicates. And I said, well, to a point I agree and to a point I disagree. [¶] And

that's why I sustained the objections, and they were not necessary because I had already ordered the [prosecutor] could not use a number of them here."<sup>7</sup>

## B

Robles contends the trial court abused its discretion in admitting evidence of more than three predicate offenses as evidence of additional predicate offenses was unnecessary and cumulative. We disagree.

To prove the gang enhancement allegations, the prosecutor had to establish, among other elements, that WSV gang members "individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subds. (b) & (f); *People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1138 (*Hill*.) To establish a " 'pattern of criminal gang activity,' " the prosecutor had to show that two or more persons, on separate occasions, committed or attempted to commit two or more enumerated offenses. (§ 186.22, subd. (e); *Hill, supra*, at p. 1138.) These offenses are referred to as " 'predicate offenses.' " (*Gardeley, supra*, at p. 610 & fn. 1.)

---

<sup>7</sup> Soto's counsel objected under Evidence Code section 352 after the fifth predicate. The prosecutor indicated he intended to introduce four more cases with six more defendants. He explained, "And my concern is with some cases coming down, make sure I lay a clear and consistent pattern for the Court to support the conviction." The trial court allowed the prosecutor to introduce two more cases and sustained the objection as to the remaining cases.



Like other gang evidence and evidence in general, evidence of predicate offenses is admissible if it is relevant, not more prejudicial than probative, and not cumulative. (Evid. Code, § 352; *People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) "[T]he decision on whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. [Citation.] 'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" [Citation.].' [Citations.] It is appellant's burden on appeal to establish an abuse of discretion and prejudice." (*Albarran*, at pp. 224-225, fn. omitted.)

To support his argument the admission of evidence of more than three predicate offenses was unnecessary and cumulative, Robles relies on *People v. Williams* (2009) 170 Cal.App.4th 587 (*Williams*). In *Williams*, a jury convicted the defendant of several substantive offenses, including active gang participation, and found true gang benefit enhancement allegations. (*Id.* at p. 595.) As part of its proof, the prosecution presented evidence of three prior crimes involving the defendant, 15 arrests or contacts with law enforcement involving the defendant, and eight predicate offenses, three of which either directly or indirectly involved the defendant. (*Id.* at pp. 598–599, 601–602.)

On appeal, the defendant challenged the admission of the evidence of the uncharged crimes and the arrests of himself and others that did not result in convictions.

He argued this evidence was both cumulative and prejudicial. (*Williams, supra*, 170 Cal.App.4th at p. 605.) The appellate court found some of the evidence admissible under Evidence Code section 1101, subdivision (b), and for impeachment. (*Williams*, at pp. 607-608.) However, as related to establishing the predicate offenses, the appellate court found the evidence was cumulative because it was repetitive, it concerned issues not reasonably subject to dispute, and it unreasonably extended the trial and the corresponding burden on the judicial system and the jurors. (*Id.* at pp. 610-611.) Of particular concern, the appellate court noted, "the endless discussions among the trial court and counsel concerning the admissibility of such evidence amounted to a virtual street brawl." (*Id.* at p. 611.)

Here, in stark contrast to *Williams*, the predicate offense evidence was not repetitive, it was not conceded, and its admission did not unreasonably extend the trial as it was contained within approximately 11 pages of reporter's transcript and nine single-sided, letter-size exhibits. *Williams* is, therefore, distinguishable and provides little assistance in resolving Robles's contention.

*Hill, supra*, 191 Cal.App.4th 1104 is more helpful. In *Hill*, a jury convicted the defendant of several substantive offenses, one of which included a gang benefit enhancement allegation that the jury found true. The defendant also pleaded midtrial to active gang participation. (*Id.* at p. 1109 & fn. 2.) To prove the gang benefit enhancement allegation, the prosecution sought to present evidence of 10 predicate offenses. (*Id.* at p. 1138.) The defendant argued the prosecution should be limited to

three predicate offenses under Evidence Code section 352. After indicating it understood the prosecution's need to present evidence of more than the two statutorily required predicate offenses, the trial court allowed the prosecution to present evidence of eight predicate offenses. (*Hill*, at p. 1138.)

On appeal, the defendant argued evidence of eight predicate offenses was cumulative and prejudicial because "four predicate offenses would have been 'sufficiently safe to withstand theoretical challenges.' " (*Hill, supra*, 191 Cal.App.4th at p. 1138.) After reviewing the *Williams* case, the *Hill* court stated, "We do not read *Williams* to create an artificial limit of seven (or fewer) predicate offenses to prove the gang enhancement. The trial court here exercised its discretion and eliminated two offenses the prosecution sought to introduce. This ruling created neither a 'street brawl' nor 'endless discussions.' No error occurred." (*Id.* at p. 1139.)

As in *Hill*, the trial court in this case understood the prosecution's need to present more than the minimum number of predicate offenses as a hedge against subsequent appellate challenges, but it nonetheless exercised its discretion to eliminate some of the offenses the prosecution sought to introduce. Also, as in *Hill*, the trial court's ruling created neither a "street brawl" nor "endless discussions." Rather, the presentation of the predicate evidence proceeded smoothly and efficiently, consuming relatively little of the trial court's or the jury's time. Consequently, we cannot conclude the trial court's decision to allow evidence of seven, rather than three, predicate offenses was arbitrary, capricious, or patently absurd.

### III

#### *Sufficiency of Evidence for Firearm Enhancement Findings*

Robles contends there is insufficient evidence to support the true findings for the subdivision (c) and subdivision (d) enhancements because there was no evidence anyone discharged a gun when Rojas was initially kidnapped. We conclude there is no merit to this contention.

"Whether a defendant used or discharged a firearm in the commission of a qualifying offense is a question of fact. [Citation.] We review the sufficiency of the evidence to support the enhancement according to accepted rules of appellate review: we view the record in the light most favorable to the prosecution and may not reverse the judgment if any rational trier of fact could have found the essential elements of the enhancement beyond a reasonable doubt." (*People v. Frausto* (2009) 180 Cal.App.4th 890, 896-897.)

"[A] firearm is discharged 'in the commission of' a felony within the meaning of section 12022.53, [subdivision] (d) [and section 12022.53, subdivision (c)] if the underlying felony and the discharge of the firearm are part of one continuous transaction, including flight after the felony to a place of temporary safety. . . . Temporal niceties are not determinative and the discharge of a gun before, during, or after the felonious act may be sufficient if it can fairly be said that it was a part of a continuous transaction." (*People v. Frausto, supra*, 180 Cal.App.4th at p. 902.)

In this case, the evidence shows Robles, Soto, and others kidnapped Rojas at gunpoint and subsequently killed him with multiple gunshots fired from at least two different weapons. Although Rojas's kidnappers did not discharge a firearm when they initially took Rojas from his apartment, Rojas's kidnapping did not end until his kidnappers discarded his body. (*People v. Burney* (2009) 47 Cal.4th 203, 233 [a kidnapping continues until the kidnapper releases or otherwise disposes of the victim and the victim reaches a place of temporary safety].) Thus, we conclude there is ample evidence to support a finding that a principal discharged a firearm during the commission of Rojas's kidnapping.

#### IV

##### *Staying Sentence for Kidnapping Conviction Under Section 654*

Robles and Soto contend the trial court should have stayed the sentences for their kidnapping convictions under section 654 because the kidnapping was incidental to, and shared the same intent and objective, as the murder. We disagree.

"[Section 654] prohibits the imposition of punishment for more than one violation arising out of an 'act or omission' which is made punishable in different ways by different statutory provisions." (*People v. Beamon* (1973) 8 Cal.3d 625, 636.) Section 654 applies " 'not only where there was but one 'act' in the ordinary sense . . . but also where a course of conduct violated more than one statute . . . within the meaning of section 654." ' ' ' (*People v. Beamon, supra*, at p. 637; *People v. Rodriguez* (2009) 47 Cal.4th 501, 507.) "Whether a course of criminal conduct is divisible and therefore gives rise to

more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; disapproved on another ground in *People v. Correa* (2012) 54 Cal.4th 331, 336; *People v. Rodriguez, supra*, at p. 507; *People v. Wynn* (2010) 184 Cal.App.4th 1210, 1214–1215.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' " (*People v. Harrison* (1989) 48 Cal.3d 321, 335; *People v. Wynn, supra*, at p. 1215.) We will uphold a trial court's finding if a defendant had a separate objective for each offense and if the finding is supported by substantial evidence. (*People v. Wynn*, at p. 1215; *People v. Racy* (2007) 148 Cal.App.4th 1327, 1336–1337.)

Here, there is substantial evidence to support a finding the kidnapping and murder of Rojas involved separate criminal objectives. Had Robles and Soto only intended to kill Rojas, they could have done so immediately upon capturing him in the bathroom, or immediately after dragging him outside. Instead, they put him in a vehicle and took him to some unknown location, where he was shot and killed. The trial court could have reasonably found from this evidence either Robles and Soto did not decide to kill Rojas until after they took him away, or they kidnapped him to terrorize him before killing him. Either scenario satisfies the separate objective requirement. (See, e.g., *People v. Brents*,

*supra*, 53 Cal.4th at p. 610.) Accordingly, we conclude the trial court did not violate section 654 by imposing separate sentences for the kidnapping convictions.

## V

### *Striking Benefit Gang Enhancement Finding*

## A

Finally, Soto contends we must vacate the 10-year sentence for the gang benefit enhancement attendant to his kidnapping conviction because the trial court was precluded by section 12022.53, subdivision (e)(2), from imposing sentences for both a firearm enhancement and a gang benefit enhancement in the same case where the defendant did not personally use or discharge the firearm.

The People disagree with Soto's argument, but assert the sentence for Soto's kidnapping conviction is unauthorized and requires correction for a different reason. Specifically, the People assert the trial court was required to impose a sentence for the attendant subdivision (d) firearm enhancement, which then would have required the trial court to stay the sentence for the gang benefit enhancement under section 12022.53, subdivision (e)(2). We agree with the People.

Moreover, as the trial court gave Robles an identical sentence for his kidnapping conviction, we obtained further briefing from him and the People on this same issue. Our decision, therefore, applies to both Soto and Robles.

## B

A sentence is unauthorized if the trial court cannot legally impose it under any circumstances in the particular case, including "where the court violates mandatory provisions governing the length of confinement" (*People v. Scott* (1994) 9 Cal.4th 331, 354) or fails to impose or strike an enhancement (*In re Renfrow* (2008) 164 Cal.App.4th 1251, 1254). We may correct an unauthorized sentence at any time, even if the correction results in a harsher punishment. (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205; *People v. Cates* (2009) 170 Cal.App.4th 545, 552; *In re Renfrow, supra*, at p. 1254.)

A principal in a gang-related felony in which another principal personally and intentionally discharges a firearm causing death is subject to an additional punishment under either section 12022.53, subdivision (d), or under section 186.22, subdivision (b), but not both. (§ 12022.53, subd. (e); *People v. Brookfield* (2009) 47 Cal.4th 583, 590, 593-594.) The trial court must impose the additional punishment provided for under section 12022.53, subdivision (d), unless the additional punishment provided for under section 186.22, subdivision (b), is greater or would result in a longer term of imprisonment. (§ 12022.53, subd. (j).)

Furthermore, the trial court must impose the additional punishment provided for under section 12022.53, subdivision (d), for each conviction to which the statute applies. (§ 12022.53, subd. (f); *People v. Oates* (2004) 32 Cal.4th 1048, 1056-1057.) The trial court may not suspend execution or imposition of the additional punishment.



(§ 12022.53, subd. (g).) The trial court also may not strike the finding underlying the additional punishment. (§ 12022.53, subd. (h).)

Here, based on the juries' true findings for the gang benefit and firearm enhancements, both Robles and Soto were subject to additional punishment for their kidnapping convictions under sections 12022.53, subdivision (d), and 186.22, subdivision (b)(1)(C). The punishment provided for under section 12022.53, subdivision (d), is 25 years to life in prison. The punishment provided for under section 186.22, subdivision (b)(1)(C), is 10 years in prison. As the punishment provided for under section 12022.53, subdivision (d), is greater and results in a longer prison term, the trial court had no discretion to stay the subdivision (d) firearm enhancements attendant to Robles's and Soto's kidnapping convictions. Instead, the trial court was required to impose the punishment provided under section 12022.53, subdivision (d). Its failure to do so, therefore, resulted in an unauthorized sentence.

Although Robles concedes the error, he does not agree modification of the sentences by this court is the appropriate remedy. Rather, he contends the appropriate remedy is for us to reverse the sentences and remand them to the trial court for resentencing. We agree.

Where an appellate court concludes a portion of a determinate sentence is unauthorized, a remand for resentencing is the appropriate remedy if the sentence included other discretionary choices potentially influenced by the unauthorized portion. (See, e.g., *People v. Neely* (2009) 176 Cal.App.4th 787, 799; but see, e.g., *People v.*

*Alford* (2010) 180 Cal.App.4th 1463, 1473 [a remand for resentencing is not required where resentencing would be futile because it would not change a defendant's prison time].) As the sentences for Robles's and Soto's kidnapping convictions included discretionary choices potentially influenced by the unauthorized portion and altering those choices could change Robles's and Soto's prison time, we conclude a remand for resentencing is the appropriate course of action in this case.

#### DISPOSITION

The sentences for the kidnapping convictions are vacated and the matters are remanded to the trial court for resentencing consistent with this decision. After resentencing, the trial court is directed to forward copies of the resulting amended abstracts of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.